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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 309

Nina N. Anthony and Graydon Anthony, Partners, d/b/a GRAYDON ANTHONY LUMBER COMPANY,
Petitioners,

v.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 316 F. 2d 858 and is reprinted in Appendix A to the Petition for Writ of

Certiorari. The findings of fact and conclusions of law of the United States District Court for the Western District of Arkansas is reported at 199 F. Supp. 286 and is reprinted in Appendix D to Petition for Writ of Certiorari.

STATEMENT

The petitioners are citizens of the State of Arkansas and are engaged in the lumber business as a partnership under the name Graydon Anthony Lumber Company. The respondent is a Delaware corporation having its principal place of business in Louisiana. Jurisdiction of the District Court was based upon diversity of citizenship and the jurisdictional amount.

On October 15, 1941, the petitioners and the respondent entered into an "Industry Track Agreement" which is set forth in Appendix F to the Petition for Writ of Certiorari. The agreement contained among other things designated clearance zones adjacent to the spur track to be laid by Respondent to serve Petitioner's lumber mill. Immediately thereafter Respondent laid a railway spur track in accordance with the agreement and in 1944 a 66-foot extension of the spur track was laid in accordance with a supplemental agreement in which the terms of the original agreement were incorporated. Thereafter Petitioners constructed a truck loading shed in violation of the minimum clearances called for in the agreement.

Respondent continued to operate its trains over the spur track. The agreement specifically provided that Respondent's knowledge of obstruction in a clearance area and its continued operation on a switch track did not constitute a waiver of the Petitioners' covenant, nor of Respondent's right to recover for such damages to persons or property as might result therefrom. On May 15, 1959, one of Respondent's brakemen, Herman

Cloudy, received serious personal injuries while working as a crew member of a train on the switch track in question. The District Court found that Cloudy was knocked from the train when his head struck the western corner of the roof line of the truck loading shed which had been constructed by the Petitioners in violation of the clearance requirements.

Brakeman Cloudy made claim against the Respondent Railway under the Federal Employers' Liability Act and the Respondent tendered the defense to the Petitioners. This tender was declined and Respondent then proceeded to make a settlement with Brakeman Cloudy by the payment of the sum of $35,700.00 plus hospital and medical expenses of $2018.50. Respondent also expended $1500.00 for costs and attorneys' fees in connection with this matter. It has never been contended that this settlement and costs were not reasonable. Respondent then brought suit against Petitioners for the full amount expended under the terms of the Industry Track Agreement. The case was tried to the District Court sitting without a jury and Respondent was awarded judgment against Petitioners for the full amount sought. On appeal this decision was affirmed by the United States Court of Appeals for the Eighth Circuit. The matter is now before this court on Petitioners' Petition for Writ of Certiorari.

ARGUMENT

I.

The Decision of the United States Court of Appeals in the Interpretation of the Indemnity Agreement is not in Conflict With the Substantive Law and Statutes of the Sate of Arkansas.

This is an action based solely upon a written contract

of indemnity. (Appendix F to the Petition for Certiorari.) In that written agreement the petitioners agreed to:

"5. Carrier shall be saved harmless from any and all expenses and liability attendant on (1st) any readjustment required of Switch to conform to any change in grade or alignment of Carrier's tracks, or any highway, or to meet any public need; (2nd) use of Switch being restricted or prevented by any governmental authority. Shipper shall prevent anyone, except Carrier, as well as refrain from placing or keeping any obstruction closer vertically than 25 feet to nearest rail of Switch, or closer horizontally than 8½ feet to center line of Switch. Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant, nor of Carrier's right to recover for such damages to persons or property as may result therefrom. Carrier, at any time, may lengthen, extend or connect with Switch, and may use same when not to the detriment of Shipper."

"6. It is understood that movement of railroad locomotives involves some risk of fire, and Shipper assumes all responsibility for and agrees to indemnify Carrier against loss or damage to property of Shipper or to property upon Shipper's premises, regardless of railroad negligence, arising from fire caused by locomotives operated by Carrier on Switch, or in its vicinity for purpose of serving Shipper, except damages to premises of Carrier and to rolling stock belonging to Carrier or to others, and to shipments in course of transportation. Shipper also agrees to indemnify and hold harmless Carrier from loss, damage or injury from any act or omission of Shipper, Shipper's employees or agents, to the person or property of the parties hereto and their employees and to the persons or property of any other person or corporation, while on or about Switch; and if any

claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally."

Despite the prohibitions contained in the above quoted provisions, the petitioners erected a truck loading shed within the prohibited area in violation of the clearance agreement. The District Court specifically found that the respondent's brakeman, Herman Cloudy, struck his head on the western corner of the roof line of this truck loading shed immediately adjacent to the nearest rail of the spur track and that this caused him to fall into the path of the wheels of the last car. (Finding of Fact No. 7.) Respondent's employee made a claim against it under the provisions of the Federal Employer's Liability Act. Respondent tendered the defense of this action to the petitioners who declined to accept it. The Respondent then settled the controversy with its brakeman and this suit was filed to enforce the Respondent's rights guaranteed it by the Indemnity Agreement.

The Court of Appeals properly held that a determination of the rights of the parties depended upon a construction of the written Indemnity Contract and that the intention of the parties must be gathered from the instrument as a whole. The Court of Appeals then construed the contract in the following manner:

> "It is apparent that the trial court determined that the parties had contracted for indemnity against losses caused by the shipper's failure to observe his covenants as to obstructions. In our view, such construction of the contract is fully warranted. In paragraph No. 5 the appellant clearly covenants to keep the track free from obstructions for specified minimum clearances. The parties then go on to say, 'Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant nor of Car-

riers right to recovery for such damages to persons or property as may result therefrom.' It is established beyond question that the shipper erected a building which violated the clearance covenant and that such violation was a substantial factor in producing Cloudy's injuries.

"The portion of the agreement relating to non-waiver manifests an intention of the parties that knowledge of the obstruction and continued use of the switch track shall not be a waiver of the covenant. Any negligence on the part of the railroad here did not go beyond such waiver. The agreement goes on further to say that the knowledge and use of the switch track shall not be a waiver of the railroad's right to recovery for such damages as may result therefrom. We consider this a clear expression by the parties of their intent to provide complete indemnity for damages caused by violation of the obstruction covenant, and to further provide that such indemnity be operative despite the fact that the railroad continued to use the tracks with knowledge of the obstruction.

"It is quite true that the intention of the parties must be gathered from an instrument as a whole. Shipper, in support of its contention that recovery should be limited to contribution, relies upon the last clause of paragraph 6, to-wit: 'and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally.' Immediately preceding the language just quoted is a provision in which the shipper specifically agrees to indemnify and hol dthe carrier harmless from any loss, damage or injury arising from any act or omission of the shipper. This indemnity language supports and strengthens our construction of paragraph 5. We believe that the trial court has adequately demonstrated, at pages 293 to 298 of 199 F. Supp., why the contribution clause of paragraph 6, relied upon by the shipper, cannot reasonably be construed to modify or detract from the indem-

nity provision of the agreement. The indemnity and contribution clauses found in *Dobry Flour Mills*, *Booth-Kelly* and the *Alpha Portland Cement* cases, supra, are almost identical to those found in paragraph 6 of the present agreement. In each of such cases, the court found the contribution clause did not wipe out or supercede the indemnity provisions.

"When the contract is viewed as a whole, we do not believe that it can be fairly said that the contribution provision relied upon by the shipper is inconsistent with the indemnity provisions of the agreement. Doubtless the contribution provisions are intended to cover situations not covered by the indemnity provisions, as where the injury is caused by some joint negligent act which is not specifically covered by the contract. For example, if the injury had been caused by an obstruction negligently placed near the tracks but outside the specified track clearances, the contribution provision would likely apply.

"In any event, if there should be any inconsistency between the indemnity and contribution provisions in paragraph 6, we believe for reasons heretofore stated that paragraph 5 provides complete indemnity in the situation here presented. Thus, like the Seventh Circuit in *Deep Vein Coal Co., supra*, we believe the specific provisions of paragraph 5 should prevail over the general provisions of paragraph 6.

"Paragraph 10 affords little additional aid in the construction problem but does give some emphasis to the binding effect of the obligations assumed by the shipper and to the nonwaiver provisions."

The Court of Appeals therefore construed the contract in such a manner as to remove any inconsistency between paragraphs 5 and 6. It held that the present action was controlled by paragraph 5. However, it

further stated that even if paragraph 5 and paragraph 6 are inconsistent that the specific provisions of paragraph 5 should apply over the general provisions of paragraph 6.

Petitioners now argue that this decision is in conflict with the *Uniform Contribution Among Joint Tortfeasors Act*, Ark. Stats. Annot. 34-1001, et seq. and the decisions of the Arkansas Supreme Court in the *Kincaid* cases, *C & L Rural Electric Cooperative Corp. v. Kincaid*, 221 Ark. 450, 256 S.W. 2d 337 (1953), and *Kincaid vs. C & L Rural Electric Cooperative Corp.*, 227 Ark. 321, 299 S.W. 2d 67 (1957). The same argument was advanced by petitioners in the Court of Appeals and was answered by that Court in the following language:

> "Since we have held that the loss here is covered by contractual indemnity, liability is controlled by the provisions of the contract and consideration need not be given to common law standards of indemnity or contribution between joint tortfeasors. In a contractual indemnity situation, the application of theories of active and passive negligence, or primary or secondary negligence, are inappropriate. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U. S. 563, 569; *Seaboldt v. Pennsylvania R. R., supra; Chicago, R. I. & P. R. R. v. Dobry Flour Mills, supra; Minneapolis-Moline Co. v. Chicago, M., St. P. & P. R. R., supra.*
>
> "Slipper's claim that the Uniform Contribution Among Joint Tortfeasors Act, adopted by Arkansas, Ark. Stats. Annot. Sec. 34-1001 et seq., supports his position is without merit. Section 6 of the Act, Ark. Stats. Annot. Sec. 34-1006, expressly provides: 'This Act does not impair any right of indemnity under existing law'."

In the *Kincaid* cases, the contractor (Delta) agreed to indemnify the owner (C & L) for injuries to persons or damages to property *caused by its (Delta's) negli-*

gence. Therefore, the Arkansas Court properly held that Delta's liability to C & L would be measured by Delta's degree of negligence in contributing to the employee's injury. In the instant case the petitioners did more than merely agree to indemnify respondent for damages caused by their negligence—*they agreed not to place any obstructions within a specified zone.* It is a violation of this covenant which gives rise to this litigation.

Insofar as the provisions of the *Uniform Contribution Among Joint Tortfeasors Act, Ark. Stats. Annot.* 34-1001 et seq., is concerned it should be sufficient to point out that Section 6 of this Act, Ark. Stats. Annot. 34-1006, specifically provides:

> "Existing rights of indemnity unaffected—This act does not impair any rights of indemnity under existing law."

In absence of other contractual agreements the provisions of this Act should be applied as between joint tortfeasors based upon a theory of contribution. However, it does not apply as between parties to an indemnity contract such as we have here. See *Thomas v. Malco Refineries, Inc.*, 214 F. 2d 884 (10th Circuit, 1954).

The written indemnity contract has been construed by the Court of Appeals in accordance with the laws and decisions of the State of Arkansas. This Court has frequently recognized that the Courts of Appeal are expert tribunals as to the laws of the states within its circuit. *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 707-708. In *Huddleston v. Dwyer*, 322 U. S. 232, 237, this court stated:

> "Ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the inter-

mediate Federal Appellate Courts."

In its final analysis the decision in this case turned upon a construction of a written indemnity contract. This is a traditional function entrusted to the trial courts and the intermediate appellate courts. It is earnestly submitted that these courts reached a proper decision and one which is not in conflict with applicable Arkansas law.

II.

The Decisions of the District Court and the Court of Appeals are Based Upon Substantial Evidence.

The petitioners contend that a Writ of Certiorari should issue because the decisions of the Court of Appeals and of the District Court were based upon speculation and conjecture rather than substantial evidence.

The long standing policy of this Court is that certiorari is not granted to review evidence and discuss specific facts. *U. S. v. Johnston*, 268 U. S. 220, 227. Or, as the court stated in *Graver Manufacturing Co. v. Linde Co.*, 336 U. S. 271, 275:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

No such showing has been made here.

However, even if the Court should desire to review the facts it would become increasingly clear that the decisions of the District Court and the Court of Appeals are supported not only by substantial evidence but by the vast weight of the evidence. The District Court made detailed findings of fact (Appendix F to the Petition for Certiorari) and the Court of Appeals found:

"The trial court properly held that the shipper covenanted to maintain specified minimum track clearances with respect to obstructions; that shipper violated said covenant; that shipper agreed to hold railroad harmless for any damages caused by the breach of such covenant; that injuries to Cloudy, for which payment was made by the railroad, were caused by shipper's breach of the track clearance covenant; and hence, the carrier is entitled to full indemnity."

As to the petitioners' specific contention that there is no evidence to support a finding that Brakeman Cloudy struck his head on the overhanging roof, the District Court discussed this aspect in its Finding of Fact No. 7 wherein it was stated:

"There is a factual dispute as to whether Cloudy was struck by an object at all, or whether the object, if one did strike him, was a part of one of the cars or a stationary object. There are two facts which convince the court that it was a stationary object, to-wit, the western corner of the roof line of the truck loading shed, immediately adjacent to the nearest rail of the spur track, which struck Herman Cloudy on his head, thus causing him to fall from the ladder between the cars into the path of the wheels of the last car. The first fact is that the only injury above his waist was a deep gash on the right side of his head. The second fact was that a chipped or splintered place was noted on the end rafter which supported the overhang or roof extension at the west corner of the truck loading shed."

In this regard the Court of Appeals held.

"We regard Cloudy's testimony as conflicting. The trial court believed that he was hit by the shed and so found. Such a finding was supported by one of Cloudy's statements and by certain physical facts pointed out by the court. Such a finding

is not clearly erroneous and may not be disturbed here."

The petitioners quote at length from one statement of Brakeman Cloudy. They do not quote and in fact do not mention an additional statement of Cloudy wherein he said: (R. 212)

> "With further reference to my accident of May 15, 1959, at Hope, Arkansas, I should like to state that I do not know just what hit me across the head, and knocked me from the car; but it was some part of the shed or building just adjacent to this spur track. It just had to be some part of that building and I believe it was the roof line just above the railroad cars, at the point where the accident took place."

Two responsible courts have already passed on this question. Their findings are amply supported by the evidence and the factual issues are now settled and do not form a proper basis for granting certiorari.

Conclusion

This litigation, like all litigation, is important to the parties. It involves a determination of relatively simple factual issues plus a construction of a written indemnity agreement. These issues have now been passed upon by the District Court and the Court of Appeals. The petitioners do not contend that this case involves issues of importance to the public, as distinguished from importance to the particular parties involved. In short, this is simply not a proper case for the granting of certiorari.

Respectfully submitted,

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